

**In the Supreme Court of the United States**

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MICHAEL HARTMAN, ET AL., PETITIONERS

*v.*

WILLIAM G. MOORE, JR.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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**REPLY BRIEF FOR THE PETITIONERS**

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PAUL D. CLEMENT  
*Acting Solicitor General  
Counsel of Record  
Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217*

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## TABLE OF CONTENTS

	Page
A. The court of appeals' decision was not dictated by this Court's precedents .....	1
B. The circuit conflict should be resolved by this Court .....	4
C. The questions presented have recurring importance .....	7
D. This case is a suitable vehicle for resolving the questions presented .....	8

## TABLE OF AUTHORITIES

### Cases:

<i>Behrens v. Pelletier</i> , 516 U.S. 299 (1996) .....	10
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998) .....	2, 3, 6
<i>Curley v. Village of Suffern</i> , 268 F.3d 65 (2d Cir. 2001) .....	5
<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994) .....	3
<i>Hunter v. Bryant</i> , 502 U.S. 224 (1991) .....	9
<i>Johnson v. Jones</i> , 515 U.S. 304 (1995) .....	10
<i>Kerman v. City of New York</i> , 261 F.3d 229 (2d Cir. 2001) .....	5
<i>Merkle v. Upper Dublin Sch. Dist.</i> , 211 F.3d 782 (3d Cir. 2000) .....	4, 5
<i>Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977) .....	2
<i>National Archives &amp; Records Admin. v. Favish</i> , 541 U.S. 157 (2004) .....	6

## II

Cases—Continued:	Page
<i>Pickering v. Board of Educ.</i> , 391 U.S. 563 (1968) .....	2
<i>Reno v. American-Arab Anti-Discrimination Comm.</i> , 525 U.S. 471 (1999) .....	2
<i>United States v. Armstrong</i> , 517 U.S. 456 (1996) .....	2
<i>Wayte v. United States</i> , 470 U.S. 598 (1985) .....	2, 8
<i>Webster v. City of New York</i> , 333 F. Supp. 2d 184 (S.D.N.Y. 2004) .....	5
Constitution:	
U.S. Const. Amend I .....	2, 3, 9

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Respondent contends (Br. in Opp. 10-22) that the court of appeals' decision was dictated by this Court's precedents; that the circuit conflict identified in the petition does not need to be resolved; that the questions presented do not have recurring importance; and that this case is an unsuitable vehicle for deciding them. Each of these contentions is mistaken.<sup>1</sup>

### **A. The Court Of Appeals' Decision Was Not Dictated By This Court's Precedents**

Contrary to respondent's contention (Br. in Opp. 10-13), this case does not involve "a straightforward application" (*id.* at 10)

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<sup>1</sup> Respondent does not take issue with petitioners' submission (Pet. 22-25) that, if the Court grants certiorari on question one (whether the existence of probable cause defeats a claim of retaliatory prosecution), it should also grant certiorari on question two (whether, if the existence of probable cause does not defeat a claim of retaliatory prosecution, the law to that effect was clearly established when respondent was charged).

of *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and *Crawford-El v. Britton*, 523 U.S. 574 (1998). Claims of retaliatory *prosecution* are distinct from other First Amendment-based retaliation claims and, again contrary to respondent’s contention (Br. in Opp. 13-14 n.7), are governed by principles analogous to those that govern claims of selective prosecution.

1. *Mount Healthy* does not hold that *any* act “taken in retaliation for the exercise of a First Amendment right violates the Constitution and is actionable even if the act, when taken for a different purpose, would have been proper.” Br. in Opp. 10. Like the other decisions in the line of cases beginning with *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Mount Healthy* involved a First Amendment challenge to a personnel decision by a public employer. The principle established in those cases thus does not apply to every “act” by the government, much less to a decision to prosecute. Unlike the decision whether to dismiss, demote, or transfer an employee, the decision whether to prosecute is one that courts are “properly hesitant to examine.” *Wayte v. United States*, 470 U.S. 598, 608 (1985). Prosecutorial decisionmaking is a “core executive constitutional function,” *United States v. Armstrong*, 517 U.S. 456, 465 (1996), and inquiries into whether a prosecutor or grand jury would have acted absent consideration of a particular factor are fraught with difficulty. Accordingly, the standard for a claim of retaliatory prosecution, unlike that for a claim of a retaliatory personnel decision, must be “particularly demanding.” *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999).

As for *Crawford-El*, that case rejected “special procedural rules” for “constitutional claim[s] that require[] proof of improper motive.” 523 U.S. at 577. This case does not implicate an across-the-board procedural rule for claims of that type—or, indeed, *any* procedural rule. Rather, petitioners contend that, in the unique context of prosecutorial decisionmaking, a substantive

claim of retaliatory prosecution in violation of the First Amendment will not lie if the charges are supported by probable cause. This Court’s decisions hold that, in the same prosecutorial context, it is not a violation of equal protection to act on the basis of a discriminatory motive if charges are also filed against those who are similarly situated. See Pet. 16-18. *Crawford-El* obviously does not alter that principle, and it has no greater bearing on the questions presented here.

Respondent likewise ignores *Heck v. Humphrey*, 512 U.S. 477 (1994), in which this Court made clear that the absence of probable cause is a substantive element of the common-law tort of malicious prosecution. *Id.* at 485 n.4. Nothing in *Crawford-El* alters the substantive elements of a malicious-prosecution claim, and respondent’s assertion that petitioners retaliated against him for the exercise of his First Amendment rights is merely one species of such a claim. See Pet. 18-19. Thus, the rule that petitioners advocate in this case, unlike the heightened pleading rule rejected in *Crawford-El*, has a firm “common-law pedigree.” 523 U.S. at 595.

2. Respondent does not offer any persuasive ground for distinguishing retaliatory prosecution from selective prosecution, such that an objective showing is required in the latter but not the former context. Respondent contends that “any difference in the elements of the claims is justified by the different constitutional sources of the right at issue.” Br. in Opp. 14 n.7. But a regime in which it is easier to establish a claim of retaliatory prosecution than a claim of selective prosecution would make sense only if free speech were somehow more important than the equal protection of the laws, and no one (including respondent) takes that position. See Pet. 17-18.

In the alternative, respondent contends that the court of appeals’ standard for retaliatory-prosecution claims *does* “require[] an objective showing”—namely, that “defendants’ improper intent had the effect of bringing about a prosecution that otherwise

would not have occurred.” Br. in Opp. 13-14 n.7. Indeed, respondent goes so far as to argue that the court of appeals’ standard “incorporates an objective showing of *probable cause*,” *id.* at 14 n.7 (emphasis added), since probable cause (according to respondent) will be “enough in most cases to establish that prosecution would have occurred absent bad intent,” *ibid.* (quoting Pet. App. 19a). But in light of prosecutorial discretion, a showing that charges would have been brought even in the absence of a retaliatory motive is a *subjective* showing, requiring—as respondent himself asserts (*id.* at 12 n.6)—a demonstration that the prosecution *would* have occurred, not that it *could* have. And as the court of appeals recognized (Pet. App. 13a), the existence of probable cause is only one of many factors that bear on the ultimate *subjective* question whether charges would have been brought if there had been no retaliatory motive. See Pet. 21-22. Moreover, that subjective inquiry is one that necessarily intrudes into the deliberations concerning prosecutorial discretion, while a truly objective inquiry allows courts to avoid such intrusion.

#### **B. The Circuit Conflict Should Be Resolved By This Court**

As the petition explains (at 13-15), there is a five-to-three circuit conflict, acknowledged within the last seven months by courts on both sides of the issue, on the question whether the existence of probable cause defeats a claim of retaliatory prosecution. Respondent contends (Br. in Opp. 14-18) that petitioners have overstated the division of authority and that, in any event, further percolation is warranted. Respondent is mistaken.

1. Contrary to respondent’s contention (Br. in Opp. 15), the Third Circuit did decide in *Merkle v. Upper Dublin School District*, 211 F.3d 782 (2000), that the existence of probable cause defeats a claim of retaliatory prosecution. The plaintiff in that case claimed that the defendants had “instituted a criminal prosecution against her” in retaliation for her speech, *id.* at 793, and the court of appeals reversed summary judgment for the defen-

dants because a jury could find that the prosecution was “motivated by a desire to retaliate” against the plaintiff, *id.* at 796. In so holding, the court found “groundless” the concern that its decision would make employers “reluctant to bring criminal proceedings against an employee even when the employee is found violating the criminal law,” because, the court explained, an employer incurs no risk of a suit for retaliatory prosecution when (unlike in that case) “the employer has probable cause to believe that its employee had committed a criminal violation.” *Ibid.* As the court below recognized (Pet. App. 15a), the decision in *Merkle* is therefore not “in accord” (Br. in Opp. 15) with the decision in this case.

Respondent is also mistaken in his contention (Br. in Opp. 15-16) that the Second Circuit held in *Kerman v. City of New York*, 261 F.3d 229 (2001), that a plaintiff can establish retaliatory prosecution “irrespective of probable cause” (Br. in Opp. 16). That case did not address the question. See 261 F.3d at 241-242. Nor did the district court decision that purportedly “followed the reasoning” (Br. in Opp. 16) of *Kerman*. See *Webster v. City of New York*, 333 F. Supp. 2d 184, 201-203 (S.D.N.Y. 2004). As the petition explains (at 14 n.4), the only Second Circuit decisions that did address the question—including *Curley v. Village of Suffern*, 268 F.3d 65 (2001), which was decided after *Kerman*—held that the existence of probable cause does defeat a claim of retaliatory prosecution.

2. Despite his effort to minimize the contrary authority in the Second and Third Circuits, respondent in the end does not dispute that there is a circuit conflict on the question whether probable cause defeats a claim of retaliatory prosecution. Instead, he contends (Br. in Opp. 16-17) that review is unwarranted because the conflicting standards will “yield the same result” except in those cases in which “strong motive evidence combines with weak probable cause,” *id.* at 16 (quoting Pet. App. 20a). The cases from the circuits that have adopted petitioners’ position,

according to respondent, “involved little or no indicia of improper motive and strong evidence of probable cause,” and thus, he argues, “[w]ere the D.C. Circuit’s methodology and holding to be applied to the facts of these \* \* \* cases, their outcomes would presumably remain the same.” *Id.* at 17.

Respondent’s theory is flawed in at least three respects. First, it is not evident why, under the court of appeals’ approach, “strong evidence of probable cause” (Br. in Opp. 17) will ordinarily enable a defendant to prevail. Probable cause “represents only one factor among many in the decision to prosecute” (Pet. App. 13a), and thus juries in the minority circuits are free to conclude that, despite abundant evidence of probable cause, charges would not have been filed but for the defendant’s retaliatory motive. See Pet. 21-22. Second, even if respondent were correct that a defendant would ordinarily be able to prevail under either standard when probable cause was clearly present, the liability of the when probable cause was present *but not clearly so* would depend on the circuit in which the lawsuit is filed. Third, even if the *outcome* of litigation will be the same in *many* cases, the *conduct* of litigation will be quite different in *all* cases. See Pet. 20-21. In the Second, Third, Fifth, Eighth, and Eleventh Circuits, there will *never* be an inquiry into the motives for bringing a prosecution that is supported by probable cause, and since the existence of probable cause can often be determined as a matter of law at the summary-judgment stage, defendants will routinely be able to prevail before trial. In the District of Columbia, Sixth, and Tenth Circuits, in contrast, there will *always* be an inquiry into motive, and since an improper motive is “easy to allege and hard to disprove,” *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 175 (2004) (quoting *Crawford-El*, 523 U.S. at 585), retaliatory-prosecution cases in those circuits will regularly proceed to trial.

3. In the alternative, respondent contends (Br. in Opp. 18) that the Court should allow further “percolation” so that the

lower courts can consider whether *Crawford-El* requires the conclusion that the existence of probable cause does not defeat a claim of retaliatory prosecution. As explained above, however, see pp. 2-3, *supra*, *Crawford-El* has no bearing on the questions presented in this case. And even if it did, there has already been ample time for “percolation,” inasmuch as eight of the ten court of appeals cases that reject the position advocated by respondent were decided after *Crawford-El* was decided. See Pet. 14 & nn.4-8. Indeed, six of the ten cases postdated *Crawford-El* by more than three years. See *ibid*.

### C. The Questions Presented Have Recurring Importance

In support of his contention that the issues in this case do not have recurring importance (Br. in Opp. 19-20), respondent points out that “the doctrine of absolute prosecutorial immunity ensures that prosecutors will almost always be entitled to immunity from suits for retaliatory prosecution” (*id.* at 19). Because cases are brought to the attention of prosecutors by the law-enforcement officers who observed or investigated the crime, however, there will almost always be a defendant available to sue for retaliatory prosecution. That is borne out by the large number of reported appellate decisions involving a claim of retaliatory prosecution, including decisions in eight circuits that address the question whether probable cause defeats such a claim.

Respondent also argues that the issues do not have recurring importance because, even under the court of appeals’ standard, “a defendant can still prevail prior to trial by showing that \* \* \* the same decision to prosecute would have been reached in the absence of the improper motive.” Br. in Opp. 19-20. While that may be true, it is also true that, under the standard advocated by respondent, there will be a problematic examination of the motive for bringing the prosecution in every case, irrespective of whether the officer-defendant ultimately wins or loses, and irrespective of whether the case is resolved before or after trial. As

explained in the petition (at 19-20), the court of appeals' decision is therefore important because it threatens to "undermine prosecutorial effectiveness" (as well as the values underlying absolute prosecutorial immunity) by "revealing the Government's enforcement policy," diverting officers from their duties, and generally "chill[ing] law enforcement." *Wayte*, 470 U.S. at 607.<sup>2</sup>

**D. This Case Is A Suitable Vehicle For Resolving The Questions Presented**

Respondent contends (Br. in Opp. 20-22) that this case is not a suitable vehicle for deciding whether the existence of probable cause defeats a claim of retaliatory prosecution because the district court found that "there are material facts in dispute concerning whether there was probable cause to prosecute [respondent]" (*id.* at 21), and thus petitioners "will not be entitled to qualified immunity even if they could prevail before this Court" (*ibid.*). That is not correct.

As an initial matter, it is not clear that the district court determined that respondent's evidence "is sufficient to permit a jury to conclude that probable cause did not exist." Br. in Opp. 21. Rather than agreeing with petitioners that the existence of probable cause defeats a claim of retaliatory prosecution but concluding that the question whether there was probable cause

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<sup>2</sup> In the minority circuits, plaintiffs in retaliatory-prosecution cases can be expected to make discovery requests like the interrogatory served by respondent a few days after the certiorari petition was filed. It demands that the government

[i]dentify all reasons why, in a given case, the United States or its officers might exercise discretion not to prosecute a person for whom there exists probable cause to prosecute, identify and describe all documents that refer or relate thereto or are concerned therewith, and identify each and every person with knowledge thereof.

Resp. Fifth Set of Interrogs. 7 (May 13, 2005).

was for the jury, the district court might have agreed with respondent that probable cause is irrelevant and concluded that it was only the questions of motive and causation that were for the jury. It is impossible to tell from the district court's one-paragraph order (Pet. App. 42a). But whatever the basis for the *district court's* decision, the *court of appeals* explicitly held that a prosecution can violate the First Amendment even if it was supported by probable cause, and thus did not reach the question whether there was probable cause for the prosecution of respondent (*id.* at 12a).

There was, moreover, sufficient circumstantial evidence of respondent's guilt, see, *e.g.*, Pet. 4-6, that, if petitioners prevailed on the legal question, either this Court (if it reached the issue) or the court of appeals or district court (on remand) could easily find that there was probable cause for prosecution. Indeed, if this Court ruled for petitioners on the legal question, a showing of probable cause would not be necessary. Petitioners would be entitled to qualified immunity as long as "a reasonable officer could have *believed* that probable cause existed," *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (emphasis added), and, on this record, it was not unreasonable to believe that there was probable cause. At a bare minimum, a conclusion that a retaliatory-prosecution claim cannot proceed when the prosecution was supported by probable cause could substantially limit the scope of proceedings on remand and avoid the need for problematic discovery into prosecutorial motivations.<sup>3</sup>

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<sup>3</sup> Respondent suggests (Br. in Opp. 21-22) that the court of appeals had no jurisdiction over the appeal from the district court's order denying summary judgment. But the court of appeals had "little trouble rejecting [that] argument," Pet. App. 8a, and its decision on that point (*id.* at 7a-9a) is correct. While "determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case," *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996), evidentiary sufficiency was not the issue in the court of appeals. The issue was whether,

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT  
*Acting Solicitor General*

JUNE 2005

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given the “facts the district court, in the light most favorable to the nonmoving party, likely assumed,” the challenged conduct violated clearly established law. *Ibid.* (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)). As the court of appeals explained, that purely legal question “fall[s] squarely within the collateral order doctrine.” Pet. App. 9a.

Respondent also contends that, given the district court’s denial of summary judgment on his Federal Tort Claims Act claim against the United States, “a trial centering around [p]etitioners’ conduct is all but inevitable,” and thus granting them qualified immunity will not protect them from the burdens of trial. Br. in Opp. 22 n.8. But there is a vast difference between being a defendant and being a witness, and the fact that petitioners may have to be witnesses obviously does not disentitle them to the protections afforded by qualified immunity from the far more onerous burdens of being defendants. Cf. *Behrens*, 516 U.S. at 311 (rejecting claim that “no appeal is available where, even if the District Court’s [no-]qualified-immunity ruling is reversed, the defendant will be required to endure discovery and trial on matters separate from the claims against which immunity was asserted”).